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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-2174

HUGH SAWYER, *Petitioner,*

v.

ATLANTIC DISCOUNT CORPORATION, and NORMAN C. HOPKINS *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Hugh Sawyer
315 Seventh Avenue, North
Naples, Florida 33940
Petitioner.

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No.

HUGH SAWYER, *Petitioner*

v.

ATLANTIC DISCOUNT CORPORATION, and NORMAN C. HOPKINS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in Hugh Sawyer v. Atlantic Discount Corporation, a corporation under the laws of the State of North Carolina, Norman C. Hopkins, entered May 14, 1971. That judgment affirmed summarily a judgment of the United States District Court for the Eastern District of North Carolina in favor of the respondents.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix A hereto. The opinion of the District Court for the Eastern District of North Carolina, at Elizabeth City has not been reported and is printed as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1971, and is printed as Appendix A hereto. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does an ex-wife share a corresponding interest or duty with an alleged creditor of her former husband regarding matters relating solely to his personal financial affairs so as to render defama-

tory statements made to her qualifiedly privileged?

2. If a qualified privilege existed, was it destroyed by actual malice or lack of good faith demonstrated by statements made with reckless disregard of whether they were false or not?

3. Should the issue of actual malice as supported by the evidence in this case present a question of fact so as to preclude disposal by summary judgment?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in Section 1 thereof:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1965, Sawyer, plaintiff, borrowed money from defendant, Atlantic Discount Corporation hereafter referred to as Atlantic. At the time this loan was made, Sawyer sent the title to a Volkswagon automobile to Atlantic. No lien was attached to the title. Sawyer repaid the loan in 1967. Atlantic had no interest in the title to the Volkswagon (T. p. 48). In October 1966, Sawyer financed a Chrysler Imperial automobile (hereafter referred to as Imperial) through Atlantic. For reasons not relevant to this case, Sawyer defaulted and the Imperial was repossessed by Atlantic.

In July 1969, Gertrude G. Sawyer called Atlantic to inquire as to the location of the title to the Volkswagon. Her call was not for the purpose of inquiring into any possible indebtedness

of Sawyer. (See App. D.) At this time she had possession of Sawyer's Volkswagon and was using it with his permission. Atlantic refused to sent Gertrude G. Sawyer the title unless alleged indebtedness of Sawyer was paid. Atlantic agreed to accept $185.58. (T. pp. 57-58.)

On July 9, 1967, Hopkins falsely reported to Sawyer that Imperial automobile had been sold for $1775.00, and that he owed a deficiency balance of $285.58. This statement was false, and the defendants failed to present any probative evidence at the trial that such a sale actually took place. The only sale of the Imperial by Atlantic was to Howard Bentley Midgette on July 19, 1967 for a purchase price of $2395. (T. p. 189.)

When Sawyer learned of the above facts, he wrote to the defendants on August 28, 1969 and again on September 14,

1969 pointing out that their statement was false and that he intended to sue for defamation. Receipt of this letter was acknowledged by registered mail receipt, but no reply has been made thereto. (T. pp. 123-127.)

In spite of Sawyer's letter denying any indebtedness to Atlantic, on February 13, 1970 Hopkins, as agent for Atlantic, wrote Gertrude G. Sawyer a letter (App. F) denying her request to return $185.58 and falsely restating that Sawyer was indebted to Atlantic, and that he (Sawyer) had lied to her regarding the status of his account.

PROCEEDINGS BELOW

District Court

Sawyer brought this suit for libel and slander as a diversity action in the District Court for the Eastern District of North Carolina, Elizabeth City Division.

The case was tried before a jury in 1970. At the conclusion of the evidence the trial judge entered judgment allowing defendant's motion for summary judgment and also directing a verdict for the defendants.

Court of Appeals

The Court of Appeals concluded that the District Court was correct in ruling for the defendants on the merits, and therefore affirmed summarily. The court gave as its stated reason that the communications to Mrs. Sawyer were protected by an unabused qualified privilege because she initiated each exchange and had a interest therein.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals in Applying the Doctrine of Qualified Privilege to a Suit for Libel and Slander in Which

No Mutual Interest or Duty Was Shared Between the Speaker and the Hearer, Has Decided an Important Question of Federal Law Which Is in Conflict with Other United States Courts of Appeal and Which Has Not, But Should Be Settled by This Court.

The Court of Appeals in rendering its decision, cited and relied on two cases. Both are clearly distinguishable from the case at bar. In Hartsville v Hines, 200 NC 356, 157 S.E. 16 (1931), the plaintiff was an employee of defendant Hines. Hines' remarks of which the plaintiff complained, imputing theft to plaintiff who was treasurer of Hines' company, were held qualifiedly privilege. Here was a clear case of speaker and hearer of alleged slander having a common interest in the subject matter, because of an employee-employer relationship. Moreover,

both speaker and hearer were officers of the same corporation. Clearly no such relationship existed between Gertrude G. Sawyer and defendant Hopkins who was acting in the scope of his employment of Atlantic. In Kroger Company v Young, 210 Va. 564, 172 S.E. 2d 720, the facts are clearly distinguishable from the case at bar. The Supreme Court of Appeals (Virginia) held that allegedly slanderous communications were qualified privileged. Here again plaintiff was employee of employer. Further, there was a common interest between the hearer and the speaker because of their employee-employer relationship and a common interest or duty to prevent "inventory shrinkage." It is respectfully submitted that the two cases cited by the Court of Appeals are clearly distinguished from the case at bar. Neither case is on point with case under consideration.

In Brown v Collins, 402 F. 2d 209, 211, Court of Appeals, District of Columbia Circuit held Brown did not come within the conditional or qualified privilege because first, Brown's communication was made to one whose interests he was not charged with protecting, either by family relationship or special friendship. In the case at bar defendants were not charged with protecting interest of Gertrude G. Sawyer, by any relationship. Second, Brown's comments were volunteered. Likewise, in the case at bar defendant Hopkins' statement as to Sawyer's alleged indebtedness was volunteered. Third in Brown, court pointed out Brown could have gone to Bar grievance committees. Similarly, in case at bar, Atlantic could have tried to collect from Sawyer. They had made no such effort in over 18 months.

In spite of the fact that both the District Court and the Court of Appeals misconstrued the evidence to conclude that Mrs. Sawyer initiated each exchange of the defamatory subject matter, that is, the alleged indebtedness of Sawyer remaining unpaid for over 2 years, the evidence is clear that she did not inquire into that subject. Hopkins testified (T lines 20-22, p. 42) as follows: "Mrs. Sawyer telephoned me and inquired if I knew the whereabouts of a title covering a Volkswagon automobile..." We can find no evidence to sustain the conclusions of the lower courts that Mrs. Sawyer made any inquiry into the defamatory subject matter. By affidavit dated 24th June 1970, Mrs. Sawyer said after being duly sworn: "... that I did not inquire of the defendant, Norman C. Hopkins, as to any indebtedness of the plaintiff,

Hugh Sawyer."

In Swift & Co. v Gray, 101 F. 2d 976 the Court of Appeals, 9th Circuit held qualified privilege relates to communications upon subject matter in which the author has an interest or in reference to which he has a duty, made to a person having a corresponding interest or duty. The Court of Appeals' decision in the case at bar conflicts with the above holding of the Court of Appeals of the 9th Circuit in that Gertrude G. Sawyer had no corresponding interest or duty in the alleged indebtedness of Hugh Sawyer.

The Court of Appeals decision seemingly conflicts with its own holding in Montgomery Ward v Watson, 55 F. 2d 184. It was held that employees had a legitimate concern with the matter of accusing plaintiff of theft in their presence. In the case at bar Gertrude G. Sawyer had no

legitimate concern in Hugh Sawyer's alleged indebtedness. Atlantic clearly had an interest in the subject. But did Gertrude G. Sawyer? Patently she did not. She had no legitimate interest in being told that plaintiff had defaulted on the payments of the Imperial and that he allegedly owed a deficiency balance which had not been paid during a two year period. The title to the Volkswagon was not assigned as collateral for debt to finance the Imperial. Atlantic's holding the Volkswagon title was unrelated to the alleged indebtedness of the plaintiff, and was being held unlawfully.

The Court of Appeals decision is of great public importance. If the questions raised are not settled by this Court, a Pandora's Box will be opened. Any lending institution, credit agency, merchant and individual could be shielded from liability

from false and defamatory communications by a new doctrine of qualified privilege wherein the hearer would not be required to have any mutual, corresponding, reciprocal or shared interest or duty in the defamatory subject matter.

Other decisions support the doctrine of qualified privilege as requiring the hearer to have a shared interest or duty with respect to the subject matter. Neigle v Seaboard Finance 173 A 2d 300 (1961). Aacon Contracting Co. v Herman 208 NYS 2d 659 (1960). Draper v Hellman Commercial Trust & Savings Bank 263 P. 240. Hager v Hanover Fire Insurance Co. of N.Y. 64 F. Supp. 949. Levesque v Kings County Lafayette Trust Co. 293 F. Supp. 1010. Fawcett Publications, Inc. v Morris 377 P. 2d 42.

B. The Determination by the Court of Appeals that the Evidence in this Case Was Constitutionally Insufficient to Support a Finding of Actual Malice and thus Permit a Summary Affirmance Presents an Important Question that This Court Should Decide.

Aside from the fact that the hearer must have a corresponding interest or duty to create a qualified privilege, this privilege is conditional or defeasible. Want of reasonable care and diligence to ascertain the truth before giving currency to the untrue communication will destroy the privilege. Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc. 367 F. 2d 625 (3d Cir. 1966). Good faith is an essential prerequisite to qualified privilege. Diplomat Electric, Inc. v. Westinghouse Electric Sup. Co. 430 F 2d 38 (5th Cir. 1970). Morgan v. Dun &

Bradstreet, Inc. 421 F. 2d 1241 (5th Cir. 1970). The protection of a qualified privilege is lost when the communication goes beyond what the occasion demands. Crawford and Company v. Graves 199 Va. 495, 100 S.E. 2d 714 (1957).

In the case at bar the defendants went beyond the occasion. Gertrude G. Sawyer, the plaintiff's ex-wife, called defendants to inquire as to the location of the title to the Volkswagon (T lines 20-22, p. 42). Defendants seized upon this occasion to collect by coercive means an alleged debt of Sawyer's from his ex-wife, a totally disinterested party to the Imperial transaction. Defendants informed plaintiff's ex-wife that they would not release the title to the Volkswagon until she made good the alleged deficiency. Later Hopkins admitted (T lines 3-4, p. 49) that Atlantic had no

interest in the title to the Volkswagon. This in itself should indicate the lack of any bona fide grounds on which the defendants based their assertion. Patton v. Royal Industries, Inc. 70 Cal. Rptr. 44 (1968). Not only did Hopkins make the original slanderous statement, he repeated it six (6) months later in a letter to the ex-wife. The Chairman of the Board of Atlantic admitted that no corporate action was taken to verify the crux of the defamatory statement (T lines 13-14, p. 177). Such plainly indicates a "conscious indifference" on the part of the Board Chairman which meets the standard of actual malice. Dun & Bradstreet, Inc. v. Nicklaus 340 F. 2d 882 (8th Cir. 1965).

Taken together the evidence is sufficient to point out that Hopkins acted with "reckless disregard" for the

rights of Sawyer and had serious doubts as to the truth of his statements. St. Amant v. Thompson 390 U.S. 727 (1968). He had a clear opportunity to check the motor vehicle records but failed to do even this.

The issue of actual malice as substantiated in the case at bar presents a question of fact, precluding disposal by summary judgment. See Pape v. Time, Inc. 354 F. 2d 558 (7th Cir. 1965), cert den 384 U.S. 909. Goldwater v. Ginzburg 261 F. Supp. 784 (D.N.Y. 1966). Eadie v. Pole 91 N.J. Super 504, 221 A. 2d 547 (1966).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

HUGH SAWYER
Petitioner

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15,331

Hugh Sawyer,

Appellant,

versus

Atlantic Discount Corporation, a corporation under the laws of the State of North Carolina, Norman C. Hopkins,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Richard B. Kellam, District Judge.

(Decided May 14, 1971.)

Before Haynsworth, Chief Judge, and Sobeloff* and Boreman, Circuit Judges.

Hugh Sawyer, pro se, for Appellant, and Dewey W. Wells, LeRoy, Wells, Shaw, Hornthal and Riley, for Appellees.

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*Senior Judge

Per Curiam:

This case is before us on two motions made by the defendants. They first filed a motion to have the plaintiff's appeal dismissed for failure to perfect a timely appeal; and second, they have moved for summary affirmance of the judgment below. Although irregularities existed in the manner of the plaintiff's appeal, this court refuses to dismiss the appeal, but, for the reasons set out below, we conclude that the District Court was correct in ruling for the defendants on the merits, and, therefore, affirm summarily.

The complaint alleges both libel and slander by the corporate and personal defendants. The matter proceeded to trial on July 30, 1970. After hearing all the evidence, the District Court directed a verdict for the defendants and ruled that summary judgment, on which he had reserved

action, was appropriate. The Court's signed judgment was not entered by the clerk until August 4, however. On August 13, the plaintiff, acting pro se, mailed several motions which tolled the time allowed for an appeal. By order filed August 25, the District Court dismissed these motions as being made outside the ten-day time limit prescribed by Rule 59 of the Federal Rules of Civil Procedure. In thus disposing of the motions, the District Court misconstrued Rule 59, for the ten days provided therein did not commence until the entry of judgment by the clerk on August 4.

The plaintiff served a timely notice of appeal from the dismissal of the post-trial motions, but his notice of appeal from the judgment itself was so late that even a tolling from August 13 to August 25 would not bring the notice of appeal within

the allotted thirty days. Although an appeal should be taken from a judgment and not a denial of subsequent motions, we are disposed in the present case to consider the case on the merits as having been raised by the timely appeal on the post-judgment motions. This is the same procedure that was followed in Livergood v. S.J. Grover & Sons Co., 3rd Cir., 361 F. 2d 269.

The plaintiff alleges two defamatory communications addressed to his recently divorced wife. The first of these occurred when Mrs. Sawyer called the office of the defendants to ascertain the whereabouts of the title certificate for a Volkswagon automobile which she possessed. The defendant Hopkins informed her that he had the title but was reluctant to deliver it to her because Mr. Sawyer had not paid a deficiency on a Chrysler automobile which

had been financed by the defendant corporation. The second alleged defamation was part of a letter from Mr. Hopkins replying to an inquiry by Mrs. Sawyer about the conditions surrounding her ex-husband's indebtedness. The offending portion of that response was as follows: "We regret that you have been misinformed by Mr. Sawyer regarding the status of his account with us, and we trust that this letter will clarify the matter for you."

The plaintiff contends that these communications defame his honesty and business capacity since he claims the debt had been fully paid. The defendants reply that there remained a deficiency after the car was repossessed and sold. The answer to this disputed question depends upon the extent of the defendant's compliance with state foreclosure laws. The District Court did not consider it

necessary to decide that issue; nor do we. Having considered the record and briefs, we hold that the trial court acted properly in dismissing this case on the merits after hearing all the testimony related to the nature of the language used, the circumstances under which they were uttered, and the lack of any aggravating conditions. The communications to Mrs. Sawyer, who initiated each exchange and had an interest therein, were protected by an unabused qualified privilege. The law of both North Carolina, the place of utterance, and Virginia, the state in which the divorced wife received the communications, is well established in this respect. "If the speaker of the alleged slanderous words has an interest or duty in the subject matter of the conversation, and the hearer has an interest or duty with respect to the

subject matter of the conversation, then the doctrine of qualified privilege applies." Hartsville v. Hines Co., 200 N.C. 356, 157 S.E. 16. And see Kroger Company v. Young, 210 Va. 564, 172 S.E.2d 720.

Affirmed

Appendix B

Opinion of the District Court (Pages 255 through line 11 page 267 of the Transcript)

A quick review of the evidence presented before the Court at this point establishes that a telephone call was made by Mrs. Sawyer to Mr. Hopkins of Atlantic Discount Corporation inquiring the location of the title to a Volkswagon automobile. She was advised by Mr. Hopkins that the title was in his possession, that he was holding that title because there was a balance due on an account by Mr. Sawyer.

The plaintiff alleges that the statement made was that the plaintiff owed certain indebtedness to the defendant, Atlantic Discount Corporation, which had not been paid and that plaintiff refused to pay.

While Mr. Hopkins does not testify nor is there evidence before the Court that there was the addition to the statement, the plaintiff refuses to pay, the Court is of

the opinion that even if the Court had before it the testimony of Mrs. Sawyer, adding that sum, it would make no difference in the statement, itself. The statement was given pursuant to a request made.

Subsequent to that time a letter was written by Mr. Hopkins of Atlantic Discount to Mrs. Sawyer, a copy of which is in evidence, which recites that there was a balance due of some two hundred and eighty-five dollars and some odd cents and that if there had not been a balance due he would not have requested payment, and he continued with some further statement that he could substantiate the balance.

The evidence further discloses that the automobile known as the Imperial, Chrysler Imperial, had been sold, which had been financed with Atlantic Discount Corporation. The payments thereon became in default. Possession and/or supposedly the title, although maybe not the certificate of title

issued by the Division of Motor Vehicles, had been transferred to another party. It was repossessed by Atlantic Discount Corportation, and the evidence before the Court is, of which there is no contradiction, it had been sold at public auction on May 29, 1967 for $1775, purchased by Atlantic Discount Corporation. Subsequent to that time Atlantic Discount Corporation, after making certain repairs to the vehicle, sold and transferred title and delivered possession of the vehicle to another party. That all occurred sometime during 1967 or approximately 1967.

The words spoken were spoken upon inquiry by Mrs. Sawyer. The words in the letter written were written upon inquiry by Mrs. Sawyer.

Mrs. Sawyer certainly had some interest in the location of the title to the Volkswagen. While it was still registed in the name of Mr. Sawyer, she related that she had had physical possession of it by and

in that the certificate of title at the time of public sale -- the total requirements of the statute may not have been complied with. It may be that, by having repossessed the car, under the provisions of the North Carolina statute permitting him in defense to show that the value of the car was greater than the amount which they gave him credit for -- it may be that he could have done so. There may have been numerous other technicalities by which he could have resisted and prevented a judgment being entered against him for $285.58. That is not the issue before the Court. The issue is whether or not the words spoken were slanderous and those written were libelous, whether they were spoken with malice or whether they were spoken at such a time as to infer malice, and not necessarily whether or not the statement that there was an account due was true and correct. That is an issue which could have been litigated as to whether or not he owed the

with the consent of Mr. Sawyer and that, because of some either loss of the vehicle or other occurrence, the insurance company was making inquiry for the title and wanted possession of it. She advised Mr. Hopkins at the time that she had a power of attorney which would authorize her to transfer the title to the vehicle.

The Court is of the opinion that, under the facts and circumstances in this case, first, the words are not defamatory; that if even they be considered defamatory they were qualifiedly privileged, in that they were given as a response to an inquiry from a person who had a right to make the inquiry.

Now, the Court does not have to decide whether or not there was any balance due and owing by Mr. Sawyer. Technically, he may have been able to defeat any recovery if action had been instituted. I do not suggest that he could or could not, but he may have been able to defeat a recovery

amount of money. The Court doesn't have to decide that, because for technical reasons he may have been free of debt. It may have been barred by the statute of limitation. The Court doesn't have to decide that. If it had been barred by the statute of limitation, as had been suggested by the plaintiff, that would not keep the debt from being due and owing. The statute of limitation only prevents the enforcement of a claim against the individual. It does not discharge the debt in and of itself.

Under all the facts and circumstance of this case, the Court is of the opinion that the motion for summary judgment on behalf of the defendant should be sustained, and the Court will sustain that motion, enter summary judgment and dismiss the action.

All right, Mr. Marshal. Bring the jury in.

The jury returned to the courtroom at

4:16 p.m. and the following proceedings occurred in the presence and hearing of the jury:

THE COURT: Ladies and Gentlemen of the jury, during the recess the court has heard argument from council concerning the law applicable to the facts of the case before you.

As I pointed out to you earlier, the law imposes upon the Court certain duties and obligations which it cannot shift to someone else. Among those is the question of whether or not slanderous words are privileged or not. The Court, itself, must decide as a matter of law. The Court also has many other duties in matters of this kind which it must decide rather than submitting the issue to a jury for its determination.

I feel that sometimes Courts may sustain those motions, bring the jury in and dismiss them, -- the jury doesn't

understand what has been done or what the Court did or why it took the action it took -- but I have the feeling that when we ask that you come to court and sit as jurors and hear evidence in the case, if the Court takes some action to dispose of it as a matter of law, that it has the obligation to explain to the jury as best it can what has happened and why it has happened.

The evidence in this case, looking at it most favorably to the plaintiff, establishes that a call was made by Mrs. Sawyer to Mr. Hopkins. Mr. Hopkins knew each of the parties, He had had considerable dealings with each of them. Mrs. Sawyer had been a comaker of a note with her husband. They held the title to the Volkswagen automobile, titled in Mr. Sawyer's name, but the company held the title with a mortgage against the automobile, although it had not physically

been recorded upon the certificate of title.

Now, what oftentimes a lien holder does: The borrower carries in to the lien holder the title to his automobile. They have him execute a mortgage to establish a lien against the automobile, but they do not send the certificate of title and Mortgage to the Division of Motor Vehicles and have it recorded on the certificate. As between the parties, themselves that is, the owner of the automobile and the borrowing agent, its just as good without being recorded on the certificate of title as it is by being recorded. The only time the lender gets in difficulty is when someone else obtains a lien against a vehicle or obtains some rights within the vehicle, and the law recognizes that if one is a bona fide purchaser or an innocent party then he may acquire a lien which is superior to the lending agency's lien,

but until that occurs the lien held by the lending agency is just as good whether it's recorded on the certificate of the automobile or not.

Some of you may have purchased some appliances from a store that took a conditional sales contract. They have a right to record that contract. I'm not familiar enough with the North Carolina statute, but in Virginia you can record it in the Clerk's office of the County or the City where that person lives, and thats notice to everybody that the seller of that appliance has a lien on it which is superior to any lien anyone else can acquire.

Now, often the sellers of those appliances and sometimes even when they sell the security paper to a lending agency, to a loan company, the loan companies, rather than spending the money that it costs to record the lien, put that in a

reserve fund, and if they have a thousand of them and it cost a dollar to record each one of them they have a thousand dollars in the reserve fund, and their experience has told them that often that thousand dollars is far greater than any loss they will sustain, and while they may lose some small portion of one, by reason of someone else acquiring a superior lien, it is for a nominal sum, and they make money and they are willing to run the risk of not recording the lien.

Now, if the Atlantic Discount didn't care to record the lien on the Volkswagen and wished to run the risk of anyone else acquiring a right on it, they have the right to do so, but that did not change the relationship between Mr. and Mrs. Sawyer and the Volkswagen, the title to which was in the possession of Atlantic Discount Corporation. So, they had an interest in it. Mrs. Sawyer had an

interest in it. She called to inquire about the title, was told that it was there, but that they were holding it because Mr. Sawyer owed them some balance due them on the Chrysler automobile.

Now, technically, the Court doesn't say, doesn't have to pass on it, whether or not they had a right to hold that certificate of title. It may be under the law that Mrs. Sawyer or Mr. Sawyer could have brought action against Atlantic Discount Corporation and made them deliver the title to the Volkswagen without the payment of a penny. That isn't the issue before the Court. The issue is: Why did Mrs. Sawyer call and why did they relate to her Mr. Sawyer owed some money?

Well, the evidence is before you that they related he owed some $285.58 and they were holding that title until that sum was paid.

The evidence further shows that by

negotiation between them they agreed to accept a lesser sum, $100 less than that, and that she paid it and sent them the check.

Subsequent to that time she wrote a letter --

I believe it would be apparent from the evidence that after she had discussed the matter with Mr. Sawyer he must have suggested to her she didn't owe the money; he didn't owe the money, and they had required her to pay the money improperly. So, she wrote them and asked them to refund it, which they refused to do.

Now, again the Court doesn't have to pass upon whether or not legally or technically she could have required Atlantic Discount to refund the money. That's not the issue. The issue is whether or not the words spoken or the information given in the reply to that letter are slanderous and, secondly, if they are slanderous,

whether they are qualified privileged, that is: Were they relieved of liability or responsibility by making answer to the inquiry?

Qualified privilege, for your information, occurs often when someone would call a store where you had been dealing or a bank and say, "Do you know Mr. or Mrs. So-and-So? What is their reputation for paying their bills? What is their reputation for honesty of character?"

When one does that and that individual answers in response to that, unless he goes beyond what is required to give a fair and honest answer and shows malice, it is qualified privileged. There is no libel. They are not liable at all because the bank or the merchant says, "Mr. or Mrs. So-and-So won't pay you," if that's been their experience. It's their privilege to do it. Otherwise no one would ever give information about another that was

detrimental and the call for information about the individual would be useless. If the person would be afraid to say, "They won't pay you," and be libel to suit, they just wouldn't say anything, and, so, you obtain nothing by it.

So, that's what the law means when it says it's qualified privileged. It is some special reason why you have a right to answer truthfully and honestly, and even if you don't answer truthfully 100 percent, unless there is malice or there is some ill will whereby you wish to hurt or injure that individual, then the privilege will be absolute protection to you. So, there was a relationship between the Atlantic Discount Corporation and Mr. Sawyer which the law recognizes as qualified privilege.

In addition to that fact, the Court had before it the issue of whether or not the words, even if untrue and not qualified privileged, were slanderous in and of

themselves, which the law refers to as per se. It means in and of themselves.

If an individual spoke concerning another, saying they were a thief, they were guilty of larceny, or a lady was not chaste and it was not true and they could not prove it, they were slanderous in and of themselves, and it doesn't make any difference whether you speak it with malice or not. So, that's what the law means when it says in and of themselves.

Of Course, the Court has ruled that the words spoken here are not slanderous in and of themselves. To say that one owes you some money, if they were to be slander, if that would constitute slander, then if one sued another for a debt and didn't recover he's accused him of owing him money and he may subject himself to liability for slander. So, unless you were certain that you could prove and recover your debt, you would be scared to say that an individual

owed you money, and , so, the Court has ruled as a matter of law the words are not slanderous in and of themselves.

Now, if they are not slanderous in and of themselves, then the only way that you can recover is to show taht you have suffered some special damages, which you must allege in your pleadings and prove.

The evidence in this case is that the words were spoken to Mrs. Sawyer, not to anyone else; the letter was written to Mrs. Sawyer and not to anyone else, and then the issue is: If Mrs. Sawyer choose to spread the word, is Mrs. Sawyer the slanderer or is Atlantic Discount Corporation?

So, the Court has ruled, under the facts and circumstances of this case, the plaintiff has not established what the law requires.

It's not a question of how I may feel about it or how you individually may feel

for one to make the statement that another has not paid a debt which they owe. That's not the issue. The question is: Under the law, does it meet the requirements of the law?

The Court has ruled, as its duty is, that it does not meet the requirements of the law and, therefore, the plaintiff cannot maintain its action and that the Court has to sustain the motion to dismiss the proceedings.

It's taken some little time. I hope I have been able to give you some knowledge about what the Court has done, because I have the sincere feeling that you're entitled to know that after you have sat and listened to all of this.

The first thing that may enter your mind is: "Well why didn't you decide that before? Why did you bring us here and have this done?"

Well, the law makes some provision

where that can be done at times. A motion can be filed for summary judgment. The procedure provides, when one sues another, either one of them can summon that individual before the time of trial, before a Court Reporter, with their lawyer, ask them all the questions and get all the answers. They can file written statements, and from those, if that constitutes all the evidence that can be presented before the jury, then the Court can by that reach a determination, but if 20 people say they don't owe you any money and you say they do the Court cannot determine that issue. That's for the jury to say, if that is the issue, itself, and, so, all of the evidence has never been presented before the Court. The Court could not rule on it. That's the reason. Not until this week were the exhibits presented before the Court, and there was not time then for the Court to rule on the issue prior to the time of

hearing all of the evidence, and that's the reason we have to bring you in and hear it. The Court hears the same evidence that you hear. Since it is a matter of law, the Court has to decide it. The jury doesn't decide the issue of law.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Elizabeth City Division

HUGH SAWYER,

Plaintiff

VS

ATLANTIC DISCOUNT CORPORATION
and NORMAN C. HOPKINS,

Defendants

FILED
Aug 4, 1970
Samuel A. Howard, Clerk
U.S. District Court
E. Dist. No. Car.

Civil No. 626

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Richard B. Kellam, District Judge, Presiding, and the Court having heard the evidence of the parties and having heard argument of counsel on the defendants' motion for directed verdict, and the Court having considered the pleadings, affidavits, stipulations and evidence of the parties and having found that there is no genuine issue of fact to be submitted to the jury, and having concluded that defendants are entitled to judgment as a matter of law.

It is hereby ORDERED that defendants' motion for a directed verdict, and defendants' motion for summary judgment, are allowed, that this action be dismissed on its merits, that the plaintiff recover nothing of the defendants, and that the defendants recover their costs.

Dated at Elizabeth City, North Carolina, this 30th day of July, 1970.

signed Richard B. Kellam
U. S. District Judge

A True Copy, Teste:
Samuel A. Howard, Clerk

By signed L. Thomas Gallop
Deputy Clerk

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Elizabeth City Division

HUGH SAWYER,
Plaintiff
vs Civil No. 626

ATLANTIC DISCOUNT CORPORATION, NORMAN C. HOPKINS, and W. G. GAITHER, JR.,
Defendants

AFFIDAVIT

Gertrude G. Sawyer of 1202 Charles Street, Fredericksburg, Virginia, being duly sworn, says as follows:

That on or about July 15, 1969, the defendant, Norman C. Hopkins spoke to her on the telephone the following utterance or words to that effect:

"Hugh Sawyer owes the Atlantic Discount Corporation a sum of money which has been due for over two (2) years". That I am unmarried and have been unmarried since January 14, 1969. This 19 day of

February, 1970.

signed Gertrude G. Sawyer
Gertrude G. Sawyer

Subscribed and sworn to before me this 19 day of February, 1970.

signed Agnes A. Mills
Notary Public for the City of Fredericksburg, Virginia

My Comm. expires September 6, 1972.

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Elizabeth City Division

HUGH SAWYER,
Plaintiff
vs Civil No. 626

ATLANTIC DISCOUNT CORPORATION
and NORMAN C. HOPKINS
Defendants

AFFIDAVIT

Gertrude G. Sawyer of 1202 Charles Street, Fredericksburg, Virginia, being duly sworn, says as follows:

That on July 18, 1969, the defendant, Norman C. Hopkins, spoke to her on the telephone the following utterance or words to that effect:

"Hugh Sawyer owes the Atlantic Discount Corporation a sum of money."

That said telephone call was communicated to me while I was in Fredericksburg, Virginia.

That I did not inquire of the defendant, Norman C. Hopkins, as to any indebted-

ness of the plaintiff, Hugh Sawyer.

That defendant, Norman C. Hopkins, in no way stated to me or in any other manner did he indicate or infer that the statement concerning the indebtedness of Hugh Sawyer and his refusal to pay same was confidential.

That I am unmarried and have been unmarried since January 14, 1969.

This 24th day of June, 1970.

signed Gertrude G. Sawyer
Gertrude G. Sawyer

Subscribed and sworn to before me this 24th day of June, 1970.

signed Emily E. Dodson
Notary Public

My Commission expires:
September 26, 1971

Appendix F

ATLANTIC DISCOUNT CORPORATION

ELIZABETH CITY, NORTH CAROLINA

Mrs. Gertrude G. Sawyer
1202 Charles Street
Fredericksburg, Virginia 22401

Dear Mrs. Sawyer:

This will reply to your letter dated January 28, 1970 regarding the remittance of $185.58 which you mailed us in July, 1969, and requesting the return of this remittance to you.

Please be advised that there was a balance owed us of $285.58 by Mr. Hugh Sawyer at the time your remittance was received. We assure you that we would not have alleged an indebtedness due us which we were not in position to substantiate. As a courtesy to you, we agreed to accept a lesser amount than that due us by Mr. Sawyer which is evidenced by the difference in the figures above shown.

We regret that you have been misinformed by Mr. Sawyer regarding the status of his account with us, and we trust that this letter will clarify the matter for you.

Sincerely yours,

signed N. C. Hopkins

N. C. Hopkins
Manager

February 13, 1970

NCH:nbp

Appendix G.

ATLANTIC DISCOUNT CORPORATION

ELIZABETH CITY, NORTH CAROLINA

June 9, 1967

Mr. Hugh Sawyer
P. O. Box 6451
St. Petersburg Beach, Florida

Re: Account No. 22368-00-3
1964 Imperial 4-Door

Dear Mr. Sawyer:

Please be advised that sale of the automobile above shown was held at 12:00 Noon on the 29th day of May, 1967, in accordance with the Notice of sale, a copy of which was mailed to you on May 16, 1967.

The automobile brought at sale $1,775.00. After crediting your account with the proceeds from the sale, there remains a deficiency balance of $285.58. Simple arithmetic will show, of course, that the pay-off of your account was

$2,060.58 prior to the sale.

We will appreciate, therefore, your mailing us this balance of $285.58 by return mail. We hope that the additional expense and embarrassment of pursuing this matter through legal channels might be avoided.

Thank you for your prompt attention.

Yours very truly,

signed N. C. Hopkins

N. C. Hopkins
Manager

NCH:ajw